

# HOUSE . . . . . No. 2424

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By Mr. Marzilli of Arlington, petition of J. James Marzilli, Jr., and Patricia D. Jehlen relative to non-business income in the taxation of certain corporations. Revenue.

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## The Commonwealth of Massachusetts

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In the Year Two Thousand and Five.

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AN ACT CHANGING THE TREATMENT OF NON-BUSINESS INCOME.

*Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:*

1 SECTION 1. Section 38 of chapter 63 of General Laws, as  
2 appearing in the 2002 Official Edition, is hereby amended by  
3 striking out subsection (c) and inserting after subsection (b) the  
4 following:—

5 (c) If a corporation, other than a manufacturing corporation as  
6 described in subsection (1) or a mutual fund service corporation to  
7 the extent of its mutual fund sales as described in subsection (in),  
8 has income from business activity which is taxable both within  
9 and without this commonwealth, its taxable net income, as deter-  
10 mined under the provisions of subsection (a), shall be apportioned  
11 or allocated to this commonwealth as follows:

12 (1) All taxable net income which is apportionable under the  
13 Constitution of the United States shall be apportioned by multi-  
14 plying said taxable net income by a fraction, the numerator of  
15 which is the property factor plus the payroll factor plus twice  
16 times the sales factor, and the denominator of which is four.

17 (2) All other taxable net income shall be allocated to this com-  
18 monwealth.

1 SECTION 2. Said section 38 is further amended by striking out  
2 subsections (k), (l), and (m) and inserting in place thereof the  
3 following:—

4 (l)(1) As used in this section, the following words shall, unless  
5 the context otherwise requires, have the following meaning:—

6 “Manufacturing corporation”, a domestic or foreign corporation  
7 that is engaged in manufacturing. In order to be engaged in manu-  
8 facturing, the corporation must be engaged, in substantial part, in  
9 transforming raw or finished physical materials by hand or  
10 machinery, and through human skill and knowledge, into a new  
11 product possessing a new name, nature and adapted to a new use.

12 A domestic or foreign manufacturing corporation’s activities  
13 will be considered to be substantial if any one of the following  
14 five tests are met:

15 1. twenty-five percent or more of its gross receipts are derived  
16 from the sale of manufactured goods that it manufactures;

17 2. twenty-five percent or more of its payroll is paid to  
18 employees working in its manufacturing operations and fifteen  
19 percent or more of its gross receipts are derived from the sale of  
20 manufactured goods that it manufactures;

21 3. twenty-five percent or more of its tangible property is used  
22 in its manufacturing operations and fifteen percent or more of its  
23 gross receipts are derived from the sale of manufactured goods  
24 that it manufactures;

25 4. thirty-five percent or more of its tangible property is used in  
26 its manufacturing operations; or

27 5. the corporation’s manufacturing activities are deemed sub-  
28 stantial under relevant regulations promulgated by the commis-  
29 sioner.

30 In determining whether a process constitutes manufacturing,  
31 the commissioner will examine the facts and circumstances of  
32 each case.

33 (2) If a manufacturing corporation, as defined in paragraph  
34 (1), has income from business activity which is taxable both  
35 within and without this commonwealth, its taxable net income,  
36 determined under the provisions of subsection (a), shall be appor-  
37 tioned or allocated to this commonwealth as follows:

38 (1) All taxable net income which is apportionable under the  
39 Constitution of the United States shall be apportioned by multi-  
40 plying said taxable net income by one hundred percent of the sales  
41 factor.

42 (2) All other taxable net income shall be allocated to this com-  
43 monwealth.

44 (3) Each manufacturing corporation with more than twenty-five  
45 employees, apportioning its income in accordance with the provi-  
46 sions of this subsection, as part of its tax return for each year,  
47 shall submit a report, whose form and substance shall be deter-  
48 mined by the commissioner of revenue, that describes for each  
49 taxable year as of the last day of such taxable year the following:  
50 (i) the number, nature, and wages of jobs added or lost in the com-  
51 monwealth and worldwide from the previous taxable year; (ii) the  
52 nature and amount of any change in the property factor during the  
53 taxable year; (iii) the nature and amount of any change in the pay-  
54 roll factor in the taxable year; (iv) the dollar amount of revenue  
55 foregone by the increased weighting of the sales factor pursuant to  
56 this section as compared to the apportionment method in effect for  
57 the first taxable year beginning on or after January first, nineteen  
58 hundred and ninety-five; (v) volume of sales in the common-  
59 wealth and worldwide; (vi) taxable income in the commonwealth  
60 and worldwide; (vii) book value of plant, land and equipment in  
61 the commonwealth and worldwide; (viii) net capital investment in  
62 the commonwealth and worldwide; (ix) net assets; (x) capacity  
63 utilization; and (xi) debts, itemized by the following categories:  
64 (a) loans; and (b) mortgages.

65 The commissioner of revenue shall annually prepare a compre-  
66 hensive report utilizing the information received in this paragraph  
67 and other sources describing and evaluating the impact, if any, of  
68 the utilization of the increased weighting of the sales factor upon  
69 the manufacturing industry. Said report shall contain only cumula-  
70 tive information for all manufacturing corporations submitting  
71 reports. Said report shall set forth for all manufacturing corpora-  
72 tions submitting reports the cumulative totals worldwide and,  
73 where applicable, in the commonwealth of the items specified in  
74 clauses (i) to (xi) and the changes in such aggregate totals from  
75 the previous taxable year. The commissioner's report shall be filed  
76 not later than October first of each year with the clerk of the  
77 senate and the clerk of the house of representatives who shall for-  
78 ward the same to their respective committees on ways and means  
79 and to the joint committee on taxation. Said report of the commis-  
80 sioner shall be a public record subject to the provisions of section  
81 ten of chapter sixty-six.

82 (m)(1) As used in this subsection and in subsections (c) and (1),  
83 the following words shall, unless the context otherwise requires,  
84 have the following meaning:

85 “Administration services”, include, but are not limited to, cler-  
86 ical, fund or shareholder accounting, participant record keeping,  
87 transfer agency, bookkeeping, data processing, custodial, internal  
88 auditing, legal and tax services performed for a regulated invest-  
89 ment company, but only if the provider of such service or services  
90 during the taxable year in which such service or services are pro-  
91 vided also provides or is affiliated with a person that provides  
92 management or distribution services to any regulated investment  
93 company.

94 “Affiliate”, the meaning as set forth in 15 USC section a-  
95 2(a)(3)(C), as may be amended from time to time.

96 “Base period employment level”, the number of qualified  
97 employees in this commonwealth of a mutual fund service corpo-  
98 ration as of January first, nineteen hundred and ninety-six, or if  
99 the mutual fund service corporation is one of the mutual fund  
100 service corporations filing a combined return for the tax year  
101 ending as of December thirty-first, nineteen hundred and ninety-  
102 six, the aggregate number of all qualified employees as of January  
103 first, nineteen hundred and ninety-six of all of the mutual fund  
104 service corporations participating in such combined return. If a  
105 mutual fund service corporation was not engaged in business in  
106 the commonwealth on January first, nineteen hundred and ninety-  
107 six, the base period employment level shall be the average  
108 employment level for the first two taxable years during which it is  
109 engaged in business in the commonwealth. In the event of the  
110 acquisition of a business or line of business or any other corporate  
111 restructuring that increases the number of qualified employees of  
112 the mutual fund service corporation, the base period employment  
113 level to be applied in the taxable year in which the acquisition or  
114 restructuring occurs and in all subsequent taxable years shall be  
115 increased to reflect such an increase. In the event of a divestiture  
116 of a line of business or other corporate restructuring that decreases  
117 the number of qualified employees of the mutual fund service cor-  
118 poration, the base period employment level to be applied in the  
119 taxable year in which such divestiture or other corporate restruc-  
120 turing occurs and in all subsequent taxable years shall be recalcu-

lated to reflect such decrease only if the mutual fund service corporation can demonstrate that such divestiture or other corporate restructuring will not result in any reduction in the number of jobs in the commonwealth.

“Distribution services”, include, but are not limited to, the services of advertising, servicing, marketing or selling shares of a regulated investment company, but, in the case of advertising, servicing or marketing shares, only where such service is performed by a person who is, or in the case of a close end company, was, either engaged in the services of selling regulated investment company shares or affiliated with a person that is engaged in the service of selling regulated investment company shares. In the case of an open end company, such service of selling shares must be performed pursuant to a contract entered into pursuant to 15 USC section a-15(b), as from time to time amended.

“Domicile”, presumptively the shareholder’s mailing address on the records of the regulated investment company. If, however, the regulated investment company or the mutual fund service corporation has actual knowledge that the shareholder’s primary residence or principal place of business is different than the shareholder’s mailing address said presumption shall not control. If the shareholder of record is a company which holds the shares of the regulated investment company as depositor for the benefit of a separate account, then the shareholder shall be the contract owners or policyholders of the contracts or policies supported by the separate account, and it shall be presumed that the domicile of said shareholder is the contract owner’s or policyholder’s mailing address to the extent that the company maintains such mailing addresses in the regular course of business. If the regulated investment company or the mutual fund service corporation has actual knowledge that the shareholder’s principal place of business is different than the shareholder’s mailing address said presumption shall not control.

“Employment level”, the number of qualified employees of the mutual fund service corporation in the taxable year, or if the mutual fund service corporation is one of the mutual fund service corporations filing a combined return for such taxable year, the sum of the number of qualified employees of all such mutual fund service corporations in this commonwealth for the taxable year.

160 “Jobs commitment level”, except as provided in subparagraph  
161 (b) of paragraph (4), for taxable years beginning on or after Jan-  
162 uary first, nineteen hundred and ninety~seven, but before January  
163 first, nineteen hundred and ninety-eight, an employment level of  
164 one hundred and five percent of the base period employment  
165 level; for taxable years beginning on or after January first, nine-  
166 teen hundred and ninety-eight, but before January first, nineteen  
167 hundred and ninety-nine, an employment level of one hundred and  
168 ten percent of the base period employment level; for taxable years  
169 beginning on or after January first, nineteen hundred and ninety-  
170 nine, but before January first, two thousand, an employment level  
171 of one hundred and fifteen percent of the base period employment  
172 level; for taxable years beginning on or after January first, two  
173 thousand, but before January first, two thousand and one, an  
174 employment level of one hundred and twenty percent of the base  
175 period employment level; for taxable years beginning on or after  
176 January first, two thousand and one, but before January first, two  
177 thousand and two, an employment level of one hundred and  
178 twenty-five percent of the base period employment level; for tax-  
179 able years beginning on or after January first, two thousand and  
180 two, but before January first, two thousand and three, an employ-  
181 ment level of one hundred and twenty-five percent of the base  
182 period employment level. If a mutual fund service corporation  
183 was not engaged in business in the commonwealth on January  
184 first, nineteen hundred and ninety-six, for all taxable years begin-  
185 ning before January first, two thousand and three, the jobs com-  
186 mitment level shall be the base period employment level increased  
187 by five percent of the base period employment level for every year  
188 after which the base period employment level is established.

189 “Management services”, include, but are not necessarily limited  
190 to, the rendering of investment advice directly or indirectly to a  
191 regulated investment company, making determinations as to when  
192 sales and purchases of securities are to be made on behalf of the  
193 regulated investment company, or the selling or purchasing of  
194 securities constituting assets of a regulated investment company,  
195 and related activities, but only where such activity or activities are  
196 performed: (i) pursuant to a contract with the regulated investment  
197 company entered into pursuant to 15 USC section a-15(a), as from  
198 time to time amended; (ii) for a person that has entered into such

199 contract with the regulated investment company; or (iii) for a  
200 person that is affiliated with a person that has entered into such  
201 contract with a regulated investment company.

202 “Mutual fund sales”, taxable net income derived within the tax-  
203 able year directly or indirectly from the rendering of management,  
204 distribution or administration services to a regulated investment  
205 company, including net income received directly or indirectly  
206 from trustees, sponsors and participants of employee benefit plans  
207 which have accounts in a regulated investment company.

208 “Mutual fund service corporation”, any corporation doing busi-  
209 ness in the commonwealth which derives more than fifty percent  
210 of its gross income from the provision directly or indirectly of  
211 management, distribution or administration services to or on  
212 behalf of a regulated investment company and from trustees,  
213 sponsors and participants of employee benefit plans which have  
214 accounts in a regulated investment company.

215 “Number of qualified employees”, the number of qualified  
216 employees who are employed by a mutual fund service corpora-  
217 tion in the commonwealth as of the last day of a given taxable  
218 year.

219 “Number of qualified employees worldwide”, the total number  
220 of qualified employees worldwide who were employed by the  
221 mutual fund service corporation on a specified date.

222 “Qualified employee in this commonwealth”, an individual  
223 who: (i) is employed by a mutual fund service corporation;  
224 (ii) works on a full-time basis with a normal work week of thirty  
225 or more hours; (iii) at the inception of the employment relation-  
226 ship does not have a termination date which is either a date certain  
227 or determined with reference to the completion of some specified  
228 scope of work; (iv) is eligible to receive employee benefits  
229 including, but not limited to, paid holidays, vacation and unem-  
230 ployment benefits; and (v) is subject to Massachusetts income tax  
231 withholding. Three or fewer individuals who collectively fulfill  
232 the requirement of clause (ii) and who each meet the requirements  
233 of clauses (i), (iii), (iv) and (v) shall be counted as one qualified  
234 employee for purposes of this section.

235 “Qualified employee worldwide”, an individual who meets the  
236 criteria in subsections (i) to (iv), inclusive, of the definition of  
237 “Qualified employee in this commonwealth.” Three or fewer indi-

viduals who collectively fulfill the requirement of clause (ii) of said definition of “Qualified employee in this commonwealth” and who each meet the requirements of clauses (i), (iii) and (iv) of said definition of “Qualified employee in this commonwealth” shall be counted as one qualified employee for purposes of this section.

“Regulated investment company”, the meaning as set forth in section 851 of the Internal Revenue Code as amended and in effect for the taxable year.

(2) Notwithstanding any other provision of the General Laws, any mutual fund service corporation having income from mutual fund sales to one or more regulated investment companies with shareholders domiciled within and without this commonwealth shall apportion or allocate such income pursuant to the provisions of subsection (c).

Furthermore, any such mutual fund service corporation whose employment level in the current taxable year is equal to or greater than its jobs commitment level for such taxable year and who satisfies the requirements of paragraphs (3) and (4), or any such mutual fund service corporation for which the jobs commitment level requirement no longer applies shall apportion or allocate such income to this commonwealth as follows:

(i) All taxable net income which is apportionable under the Constitution of the United States shall be apportioned by multiplying said taxable net income by one hundred percent of the sales factor.

(ii) All other taxable net income shall be allocated to this commonwealth.

(3) Notwithstanding a mutual fund service corporation’s failure to achieve its jobs commitment level in the taxable year, the percentage set forth in clause (i) of paragraph (2) of subsection (in) may be applied, where the failure to achieve the jobs commitment level for any taxable year is demonstrated by the mutual fund service corporation to be a direct result of adverse economic conditions in that taxable year.

(a) Adverse economic conditions can affect only one taxable year except as set forth in subparagraph (b) and (c). Adverse economic conditions shall exist only where during any twelve month period ending during the taxable year, either: (A) the Standard &



277 Poor's Stock Index decreases ten percent or more compared to its  
278 level at the beginning of such twelve month period or (B) the  
279 average daily trading volume on the New York Stock Exchange  
280 decreases fifteen percent or more compared to the average over  
281 the preceding twelve months; or (C) at any time during the taxable  
282 year, the total assets under management of the mutual funds  
283 served by the mutual fund service corporation decreases twelve  
284 and one-half percent or more compared to such total assets under  
285 management twelve months earlier.

286 (b) If a mutual fund service corporation demonstrates that  
287 failure to achieve the jobs commitment level for one taxable year  
288 was the direct result of an adverse economic condition, such cor-  
289 poration may decrease its jobs commitment level by five percent  
290 of the base period employment level for all subsequent taxable  
291 years prior to the first taxable year beginning on or after January  
292 first, two thousand and two.

293 (c) If a mutual fund service corporation demonstrates that  
294 failure to achieve the jobs commitment level for more than one  
295 taxable year was the direct result of an adverse economic condi-  
296 tion, such corporation may decrease its jobs commitment level by  
297 five percent of the base period employment level for each taxable  
298 year in which an adverse economic condition was established for  
299 all subsequent taxable years prior to the first taxable year begin-  
300 ning on or after January one, two thousand and two. However, for  
301 each taxable year beginning on or after January first, two thou-  
302 sand and two, but prior to the first taxable year beginning on or  
303 after January first, two thousand and four, the jobs commitment  
304 level shall be an employment level equal to the sum of: (i) the  
305 jobs commitment level for the most recent taxable year immedi-  
306 ately prior to such year for which an adverse economic condition  
307 was not established; and (ii) five percent of the base period  
308 employment level.

309 (4) For the purposes of determining compliance with the provi-  
310 sions of this subsection, each mutual fund service corporation that  
311 seeks to rely on the provisions of this subsection for the taxable  
312 year in question shall submit, as part of its tax return, a report,  
313 with such supporting documentation as the commissioner may  
314 require, containing the following:

- 315 (i) the number, nature, and aggregate wages of the qualified  
316 employees in this commonwealth and qualified employees world-  
317 wide as of the end of the taxable year and the number of jobs  
318 added or lost as compared to the previous taxable year;
- 319 (ii) the number of the qualified employees in this common-  
320 wealth as of the last day of the taxable year sorted by place of  
321 employment;
- 322 (iii) the base period employment level;
- 323 (iv) the volume of sales attributable to this commonwealth and  
324 worldwide;
- 325 (v) the taxable income in this commonwealth;
- 326 (vi) net assets under management in this commonwealth and  
327 worldwide; and
- 328 (vii) the median income of all of qualified employees in the  
329 commonwealth and of all of its qualified employees worldwide.
- 330 The information provided by each individual mutual fund  
331 service corporation shall be treated as confidential under the pro-  
332 visions of section twenty-one of chapter sixty-two C. Said infor-  
333 mation shall be used by the commissioner of revenue to prepare a  
334 comprehensive annual report setting forth the changes in-the  
335 aggregate from the previous taxable year for each of the items  
336 listed above. The commissioner's report shall also set forth any  
337 recommendations the commissioner may have for any amend-  
338 ments to the provisions of this section, and the reasons for any  
339 such recommendations. The commissioners report shall be filed  
340 by October first of each year with the clerk of the senate and the  
341 clerk of the house of representatives who shall forward the same  
342 to the respective, committees on ways and means and the joint  
343 committee on taxation.
- 344 (5) The commissioner of revenue shall promulgate regulations  
345 implementing the provisions of this subsection.